Medical Center of Ocean County *and* International Union of Operating Engineers, Local 68-A, AFL–CIO. Cases 4–CA–21694, 4–CA–21793, 4–CA–21794, and 4–RC–18096

December 27, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On July 14, 1994, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent and Charging Party filed exceptions and supporting briefs and the General Counsel filed cross-exceptions and a supporting brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Medical Center of Ocean County, Point Pleasant, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election conducted on June 24, 1993, is set aside and that the Regional Director shall direct a second election whenever he deems it appropriate.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No exceptions were taken to the judge's conclusion that he need not reach and determine further allegations (complaint pars. 5(c) and (d)) involving Schibla's conversations with employee Lindsay concerning a threatened loss of pension benefits or Schibla's alleged interrogation of employee Maxson both occurring on or about May 14, 1993, or to his dismissal of complaint allegation 6(b) regarding an alleged promise of benefit to employee Mack. Further, no exceptions were taken to the judge's finding that the challenge to the ballot of Albert Behring be overruled.

Carmen P. Cialino Jr., Esq., for the General Counsel.
David F. Jasinski, Esq. (Jasinski & Paranac, P.C.), of Newark, New Jersey, for the Respondent.
Raymond G, Heineman Jr., Esq. (Kroll & Gaechter), of Verona, New Jersey; and *Jeffrey K. Lee*, Organizer IUOE Local 68-A, of West Caldwell, New Jersey, for the Union-Petitioner.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard in Philadelphia, Pennsylvania, on five occasions on and between April 11 and 20, 1994, on General Counsel's consolidated complaint, dated August 16, 1993,[1] which alleges various acts of independent violation of Section 8(a)(1) of the Act together with the unlawful discharge of an employee, John Cilento, in violation of Section 8(a)(3) and (1).

On May 27, 1993, the Regional Director for Region 4 issued a Decision and Direction of Election in Case 4–RC–18096 and on November 2, 1993, issued a supplemental decision on objections to election and challenged ballots. Thereafter, in the presence of and following various intermediate procedures including Respondent's request for review of the Regional Director's supplemental decision, the Regional Director, on January 28, 1994, ordered that the hearing on objections and challenges be consolidated with the above-captioned unfair labor practice proceeding, all of which was to be heard by a duly designated administrative law judge.

Respondent filed a timely answer admitting certain allegations of the consolidated complaint, denying others, and denying the commission of unfair labor practices.

At the hearing, the parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs which have been carefully considered.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, comparing such testimony with the testimony of both adverse and sympathetic witnesses, the interest of the witnesses and documentary evidence, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find, that Respondent, Medical Center of Ocean County (MCOC), a New Jersey corporation, has been engaged in the operation of an acute care hospital with facilities in Brick and Point Pleasant, New Jersey. In the past year, in conducting its busi-

[1] The underlying charge in Case 4–CA–21694, filed by the Union (International Union of Operation Engineers, Local 68-A, AFL–CIO) was served on Respondent (Medical Center of Ocean County) on May 12, 1993, with an amended charge filed on August 12, 1993, and served on August 13, 1993. The charge in Case 4–CA–21793, filed by the Union on June 15, 1993, was served on Respondent on June 16, 1993. The charge in Case 4–CA–21794, filed on June 15, 1993, was served on Respondent on June 16, 1993.

ness operations, Respondent received gross revenues in excess of $500,000 and purchased and received materials and supplies valued in excess of $50,000 directly from points outside the State of New Jersey. Respondent concedes, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the act and has been a health care institution within the meaning of Section 2(14) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that at all material times, the Union (International Union of Operating Engineers, Local 68-A, AFL–CIO) has been and is a labor organization within the meaning of Section 2(5) of the Act.[2]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Medical Center of Ocean County, a New Jersey nonprofit acute care hospital system consists of two primary care facilities (Point Pleasant Hospital and Brick Hospital, with a total of over 400 beds), a half-dozen satellite facilities throughout Ocean County, and a further facility in Manahawkin, New Jersey. MCOC employs over 2000 employees at these facilities.

On April 12, 1993, the Union filed a petition for certification originally requesting representation of all regular full- and part-time skilled maintenance employees employed at Respondent's Point Pleasant facility. Thereafter, the Union amended its petition to include all skilled maintenance employees employed both at Point Pleasant and Brick Hospitals. Following hearings pursuant to this petition (Case 4–RC–18096) on May 3 and 11, 1993, the Regional Director, on May 27, 1993, issued a Decision and Direction of Election. The parties having agreed that a unit of skilled maintenance employees at the Brick and Point Pleasant facilities was appropriate, the Regional Director found that the following skilled maintenance unit was the appropriate unit:

> All full-time and regular part-time skilled maintenance employees, including lead stationary engineers, stationary engineers, lead heating, ventilation and air conditioning (HVAC) mechanics and HVAC mechanics, electricians, maintenance mechanics, maintenance helper-drivers, locksmiths, carpenters, painters, masons, plumbers, helpersand bio-medical technicians, employed at the Employer's Brick and Point Pleasant Hospital Divisions, excluding all other employees, the Power Plant Manager, Maintenance Director, Assistant Maintenance Director, Guards and Superiors as defined in the Act.[3]

On June 24, 1993, the Board conducted a secret-ballot election in the above skilled maintenance unit wherein the tally of ballots showed:

Approximate number of eligible voters	40
Void Ballots	0
Votes cast for Petitioner	18
Votes case against participating labor organization	20
Valid votes counted	38
Challenged ballots	6
Valid votes counted plus challenged ballots	44

On June 29, 1993, the Union filed objections to Respondent's conduct affecting the results of the election. Of the nine specified paragraphs of union objections affecting the results of the election, substantially all, as hereafter noted, were incorporated in the instant consolidated complaint as parallel acts of alleged unfair labor practice committed by Respondent.

On January 28, 1994, the Regional Director, having disposed of three of the six challenges, ruled, inter alia, with regard to the three remaining challenged ballots, that the challenges concerning John Cilento, Albert Behring, and Norman Piercy presented questions of fact requiring an evidentiary hearing for resolution. He ordered the hearing on these three challenges be consolidated with the unfair labor practice hearing and the hearing on objections. At the hearing, all counsel agreed that the unfair labor practice allegations in the complaint and the objections to the election were substantially coextensive.

B. *Violations of Section 8(a)(1) of the Act*

1. The May 14, 1993 ''pizza party''

There is no dispute that at noon, sometime in mid-May 1993, Maintenance Department Supervisors Robert Vogel and Victor Schibla convened a meeting of about 30 skilled maintenance employees, power plant employees, and biomedical employees in the Point Pleasant medical staff board room next to the cafeteria. Although in the past, Respondent's president, Gribbin, and vice president, Jarvis, had met with employees chosen on a random basis (Gribbin) or, rarely (Jarvis), on a departmental basis, there is no dispute that there had never been an ''off-the-record'' pizza party held by Vogel or Schibla only for the skilled maintenance employees and other unit employees. Michael Maxson, a carpenter and unit employee, employed by Respondent for about 4 years, had never before experienced such a meeting. After the employees finished their pizza, Supervisor Vogel asked them only if they had any questions.

Employee Dan Blunk said that he would start the conversation and said that if the Union got into Respondent's

[2] Respondent's admissions at the hearing, together with admissions in the pleadings, demonstrate, as Respondent concedes, that at all material times the following persons have been and are its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act: John T. Gribbin, president; Charles Jarvis, vice president; David Kaplan, vice president; Robert Vogel, assistant director, Point Pleasant facility; Victor Schibla, assistant maintenance director, Point Pleasant facility; and Martin Giacobbe, construction manager. Frances Keane, Respondent's assistant vice president for employee relations, is also a supervisor and agent within the meaning of the Act.

[3] In the May 27, 1993 Decision and Direction of Election, the Regional Director found, inter alia, that William Gaunt, a leadman in the power plant, was not a supervisor within the meaning of the Act and was properly included in the above skilled maintenance unit. Gaunt voted in the June 24 election without challenge.

hospital, the unit employees would lose their jobs because Respondent ''would get an outside concern in and that Respondent would hire [sub-contractor] Service Master.'' Blunk said that he had seen it done before. Vogel had assured the employees at the beginning of the meeting that he wanted to hear if they had anything to talk about and that they would have no worries from management coming back to them as to what was said; that it was ''off-the-record.'' (Tr. 28.) How Blunk may have known that Vogel and Schibla desired questions about the Union is not known.

In response to Blunk's statement, leadman William Gaunt called Blunk ''an asshole'' and they went ''into each other's face.'' (Tr. 55–56.) In order that the ensuing yelling match go no further, employees pulled Gaunt away and hustled him out of the room. The meeting continued.

Thereafter, Vogel told the group that if the Union got in ''we are not going to be getting along like we are now, we are not going to be able to have these types of meetings.'' (Tr. 29.) Maxson and John Cilento, who was sitting nearby, recalled that Cilento then said that he had worked under a union shop before and had never had any problems.

Cilento recalled that he said that he had belonged to a union before and that management and employees had gotten along fine. (Tr. 109–110.) In response, Vogel asked him why he left the job [if he was satisfied with his prior job]. Cilento told him he left his prior job because of the commutation involved.[4] When Cilento told him he left the job because of commutation problems, Vogel asked him if the union had tried to get him another job. Cilento answered that he did not ask the union to get him another job because, in fact, he started work for Respondent. (Tr. 110–111.)

After the meeting ended, Cilento and Maxson left the room and were walking in the basement hallway to return to their jobs (Cilento is a licensed plumber) when Supervisors Vogel and Schibla approached them. Vogel asked Cilento (Tr. 33): ''Why don't [you] give management 6 months to straighten up all [employee] problems. If after the 6 months anything isn't fixed up, you guys can go ahead and start with the Union again and you'll have no problem getting the vote in. You'll have 100 percent of the vote.''

In this same conversation, Vogel asked Cilento and Maxson (Tr. 33) why they did not come to Vogel first before going to the Union and Maxson told him that (Tr. 33): ''Well, no one ever listened to us in the past, why should they start to listen to us now?'' Cilento then broke in: ''Why should we give up the union now? If we do, we will lose our jobs.'' When Vogel responded that ''that would be illegal,'' Maxson told him: ''Yeah, well, you can make up reasons.'' Vogel asked them to try to convince the (unit employees) to ''forego the Union to give management a chance . . . to hear our grievances and to let management try and work out [our problems] as . . . long as they did not go union.'' (Tr. 111.)

Respondent's Version of the Pizza Meeting and Thereafter

Respondent presented two witnesses relating to the pizza meeting, Victor Schibla and Robert Vogel. The testimony of neither witness related to events which occurred at the pizza meeting itself. In this regard, therefore, the testimony of Cilento and Maxson stands unrefuted on the record. It is credited.

With regard to events in the hallway immediately following the pizza meeting, Victor Schibla and Robert Vogel testified.

Victor Schibla

Schibla testified that he recalled that Cilento asked Vogel what Vogel would do ''if he were them,'' and Vogel responded that he ''would give the hospital a chance for 6 months [and] if you weren't happy, you could vote the union in.'' (Tr. 607.) In response to a leading question as to whether he left the other participants during the conversation, Schibla said that he heard no one else say anything. (Tr. 608.) I do not credit this answer.

The substance of Schibla's testimony doe not contradict the testimony of Maxson and Cilento. In large part, it corroborates it. It is unclear from his testimony whether, during a period of this hallway conversation among Maxson, Cilento, and Vogel, Schibla, himself, was in their immediate vicinity during the entire conversation. At one point, he testified, that he was about 16 to 20 feet, way from them during the time they were talking. (Tr. 686.)

Robert Vogel

As in the case of Schibla's testimony, Respondent chose not to examine Vogel with regard to what occurred at the pizza party itself. Like Schibla, Vogel places the meeting in mid-May 1993, after which Vogel said he spoke with Maxson and Cilento in the presence of Schibla while walking in the hallway. Vogel, like Schibla, recalls Cilento asking ''what would [Vogel] do in my shoes.'' (Tr. 735–736.) Vogel recalls his answer was: ''I would give the hospital a second chance. . . . They treat you well . . . they pay you pretty good, normal. Benefits are good. Just give them the opportunity to meet your needs.'' (Tr. 736.)

Discussion and Conclusions

The evidence shows that the pizza party meeting occurred in mid-May 1993 and thus about a month following the filing and service of the Union's election petition. The complaint alleges (par. 6(a)) that in substance, on or about May 14, 1993, Respondent violated Section 8(a)(1) of the Act by promising employees improved benefits in order to discourage them from selecting the Union as their collective-bargaining representative and solicited employees to convince other employees to vote against union representation.

Maxson's version of the hallway conversation after the pizza party was that Vogel asked Cilento and Maxson why they did not give Respondent ''6 months to straighten up all their problems'' after which they could vote the Union in if the solution to the problems were not made.

Schibla agreed that Vogel told Cilento and Maxson that the employees should give Respondent a chance for 6 months and then if the employees were not happy (with the results) they could vote the Union in. (Tr. 607–608.) Schibla, I find, correctly construed this to mean a Vogel promise to rectify past Respondent wrongs to the employees because, on cross-examination, he testified that Vogel told Cilento and Maxson to give the hospital a 6-month chance and ''if we

[4] Cilento worked at the Jersey City Medical Center for 14 years as a steam fitter/plumber/mechanic.

don't do what you want to do, the union will be voted in by the people.'' (Tr. 686.) In short, Vogel, according to Schibla, was promising the employees to rectify their problems in a 6-month period and if the Respondent failed to do so, they should feel free to vote the Union in. This is a promise of a benefit contingent on the employees surrendering their rights to bring the Union in at least for 6 months. Vogel's promise of benefit is thus a quid pro quo for the surrender of statutory rights and violates Section 8(a)(1) of the Act as alleged. The promise of benefits in exchange for surrender of statutory rights, especially during a union organizing campaign, is unlawful. *St. Margaret Memorial Hospital v. NLRB*, 991 F.2d 1146, 1150 fn. 4 (3d Cir. 1993).

The second wing of the alleged violation is the assertion that Vogel asked Maxson and Cilento not only to give Respondent 6 months free of the Union to permit Respondent to rectify unit employee problems, but to convince the other unit employees to ''forego the union and to give management a chance to 'meet [our] needs' . . . to hear . . . our grievances, and to let management to [sic] try an work out any problems that the guys might have, as long as they didn't go Union.'' (Tr. 111.) Vogel admits requesting for Respondent a second chance ''to meet your needs.'' (Tr. 736.)

Maxson corroborates Cilento with regard to Vogel requesting that they speak to the other unit employees to ask them to forego supporting the Union and Maxson told Vogel ''we'll see.'' (Tr. 34.) Neither Schibla nor Vogel specifically denied these elements in Vogel's conversation with Cilento and Maxson in the hallway. I do not accept Vogel's testimony that ''nothing else was discussed'' (Tr. 737) as denying Maxson's and Cilento's testimony. If it were to be construed as a denial, I would discredit it.

The Board rule is that while an employer may unlawfully ask employees to vote against the union, the employer violates Section 8(a)(1) when it asks an employee to make the same request of other employees. *Permanent Label Corp.*, 248 NLRB 118, 132 (1980). I find that Vogel's request to Cilento and Maxson on or about May 14, 1993, that they should try to convince other employees to give Respondent another chance in order to meet their ''needs'' violates Section 8(a)(1) of the Act. It is a solicitation of employees to request their fellow unit employees to desist from engaging in union activities and therefore is coercive within *Permanent Label Corp.*, supra; and it is also an unlawful promise of benefits (Vogel: just give Respondent the opportunity to ''meet your needs.'' (Tr. 736). Schibla (Tr. 607–608, ''give the hospital a chance for 6 months . . . if you were not happy [with the results], you could vote the union in).'' General Counsel has thus proved the 8(a)(1) violations of paragraph 6(a) of the complaint by a preponderance of credible evidence.

I find it convenient here, rather than postponing this matter to the discussion of Cilento's discharge, to again note that Respondent's examination of Vogel and Schibla avoided inquiry concerning the events at the pizza meeting itself. This despite unrewarding cross-examination of Maxson and Cilento on the issue. (Tr. 144 et seq.) Therefore, the record is uncontradicted (as both Maxson and Cilento credibly testified) that when Vogel told the pizza party unit employees that if the Union got in, the Respondent and the unit employees were ''not going to be getting along like we are now'' (Tr. 29), Cilento responded that he had worked under a union shop before and never had any problems in the past. (Tr. 29.) In view of the mutual corroboration by Vogel and Maxson (Tr. 29; Tr. 109–110), and in view of Respondent's failure to address, much less to deny, this testimony, I find that Cilento made known his prior union membership when he disputed Vogel's assertion that the presence of a union caused the employer and the employees to become alienated from one another. He further identified himself as a union member during the pizza party when he told Vogel that he left his prior union job because of a commutation problem and that it was his resulting employment with Respondent which made it unnecessary to ask the union to find him a further job.

Respondent nevertheless asserts that there was no record evidence showing Respondent's predischarge (June 9, 1993) knowledge of Cilento's union activities and support. (R. Br. 40, et. seq.) As above noted, neither Vogel nor Schibla denied Maxson's and Cilento's otherwise credible testimony concerning Cilento identifying himself as a union member and ostensibly a union supporter.

Respondent argues with some heat that the one employee in the pizza party audience who should have corroborated Maxson's and Cilento's testimony but who failed to do so was William Gaunt. Gaunt had identified himself as a union supporter by taking immediate forceful issue with employee Blunk's statement that a union in the shop would cause Respondent to subcontract out their unit jobs. (Tr. 411, Blunk may have spoken for Respondent.) The problem with Respondent's argument, however, is that Respondent, on its own cross-examination, established that immediately upon Gaunt's (''ass-hole'') confrontation with employee Blunk (Respondent's observer at the June 24 election), Gaunt's coemployees hustled him out of the room in order to avoid a possible physical confrontation with Blunk. This occurred at the opening of the meeting upon Blunk being the first employee to express his views. Cilento spoke and identified his union sympathy only at a time subsequent to Gaunt's exit. The fact that Gaunt did not identify Cilento as a speaker at the meeting is thus explained, on this record, by his having been previously hustled out of the room. Further, even if Cilento spoke while Gaunt was hustled out of the room, there would be little reason for him to recall that Cilento was then speaking, much less what he said. In the absence of Respondent establishing (Tr. 411–412) that employee Gaunt was in the room (Tr. 56) at a time that Cilento spoke, Gaunt's failure to identify (Tr. 411–412) Cilento as a speaker has been explained. In any event, Respondent's apparently studied effort in avoiding having Schibla and Vogel testify with regard to what occurred at the pizza meeting itself, together with the mutually corroborative testimony of Maxson and Cilento, leads me to credit the testimony of Maxson and Cilento in this regard. I therefore conclude, as will be noted hereafter, that at all material times following May 14, 1993, Respondent had actual knowledge that Cilento had been a former union member and was presently a supporter of the Union. In addition, I have credited Maxson's and Cilento's testimony that their hallway conversation with Schibla and Vogel included their statement: ''Why should we give up the Union.''

Maxson and Cilento testified that they mentioned the substance of the post-pizza party hallway conversation with Vogel to several other employees. Cilento testified, without

contradiction, that he spoke with employees Sacko, Gaunt, and Skerchek. (Tr. 141.)

2. The alleged unlawful interrogation of and threats made to employee Billy Mack (complaint par. 5(a))

Employee Billy Mack, a mechanic in the skilled maintenance department, testified concerning two conversations he had with his supervisor, Victor Schibla. (Tr. 313.) The first was in mid-May 1993, and the second about 2 weeks thereafter. (Tr. 314.) Since Schibla testified only with regard to the second conversation, which occurred outside the building (Tr. 614), Mack's testimony with regard to the first conversation is uncontradicted and credited.

In mid-May 1993, on worktime, Schibla called Billy Mack into his office and closed the door. In the 10 years that Schibla had worked for Respondent, he had never worked with Schibla before this and had never been called into an office for a conversation with his supervisor where the door was closed.[5]

In the office, Schibla closed the door (Tr. 281) and told Mack that he wanted to talk to him. He asked Mack: ''What's going on; what's happening?'' When Mack answered: ''Well, you want to know about the Union,'' Schibla said: ''Now that you mention the union, we can bring it up.'' (Tr. 280.) At this point, Schibla told Mack that he ''could lose [his] benefits, I could lose just about everything, and . . . union dues can be real expensive.'' Mack said he did not understand; that he did not know much about it and that he had attended only one union meeting. (Tr. 283–284.) That was the end of the conversation and Mack went back to work.

In this conversation, Schibla said nothing of the loss of benefits resulting from negotiations (Tr. 312–313). The subject of loss of benefits through negotiations occurred 2 weeks later in a second conversation. (Tr. 314–315.)

Discussion and Conclusion

Interrogation

There is no dispute that Schibla called Mack into the office and himself closed the door telling Mack that he wanted to talk to him. When Schibla asked the question: ''What's going on; what's happening?,'' and when Mack answered: ''Well, you want to know about the union,'' it is evident that Schibla's studiously ambiguous question, as reasonably interpreted by Mack, related to Schibla's desire to know about either or both Mack's union sympathies or union activities in the shop. There is no suggestion in the record that Mack was an open or notorious union supporter nor even that Respondent suspected that he was. For the immediate supervisor to direct the employee into a room in which the door is shut; where this has never happened in 10 years; and where the supervisor directs the conversation to the unsuspecting employee about the union, this is coercive interrogation within the meaning of *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Center*, 277 NLRB 1217 (1985); compare: *Regency Manor Nursing Home*, 275 NLRB 1261 (1985). I conclude that Schibla's inquiry related to not only Mack's union activities and possible support, but to the activities of other employees in the shop. That is the purport of Schibla's question. That Schibla did not use the word ''union'' is not dispositive. It is actually none of Schibla's lawful business as to Mack's evaluation of union activities in the shop when directing a subordinate employee to discuss union activities during a union organizing campaign in a closed room. This is precisely the type of information that Mack was privileged to keep from Respondent. See *Laredo Coca Cola Bottling Co. v. NLRB*, 613 F.2d 1338, 1342 fn. 7 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). Schibla violated Section 8(a)(1) by this coercive interrogation.

Alleged Unlawful Threats

According to the uncontradicted and credited testimony, Schibla also told Mack in that closed office: ''You could lose your benefits; union dues are expensive; you could lose just about everything.'' (Tr. 282.) Respondent's sole defense is that Schibla's threat to Mack was phrased in the conditional ''could'' rather than ''would'' which would be unconditional.

It is true that some Board cases, e.g., *Monfort of Colorado*, 298 NLRB 73, 85 (1990), suggest that there is a necessity for a ''probability'' that the employer would act differently with respect to a benefit if the union was voted in before the Board would find a violation based on this ''prediction about the effects of unionization.'' Here, there is no implication of ''a probability'' that the Respondent would act differently in the face of unionization; there is only Schibla telling Mack that he could lose his ''benefits'' and lose ''just about everything.'' In the instant case, in the presence of a one-on-one conversation behind closed doors at the summons and instance of the supervisor, and in the absence of any suggestion that the loss of benefits which ''could'' result was to be derived from negotiations in the give-and-take of collective bargaining, *Regency Manor Nursing Home*, supra, and in view of the fact that such a closed door conversation never occurred before in the 10 years of Mack's employment, I find that the threat of loss of benefits if the Union became the bargaining agent was unlawful within the meaning of Section 8(a)(1) of the Act and that the use of the word ''could'' in the presence of Respondent's unfair labor practices does not offer a defense as Respondent argues, *United Technologies*, 313 NLRB 1303 (1994).

Respondent's unintentionally misleading brief (Br. 18) suggests that in this conversation, Schibla stated that: ''No one really knows what can happen in negotiations'' and that ''nobody knows for sure.'' (Tr. 313–315.) Such statements by Schibla did not occur in this conversation. They occurred only in a conversation 2 weeks later. (Tr. 314–315.) That conversation is *not* alleged to constitute a violation of the Act. There is, of course, no basis for confusion since the record is completely clear. The subject of a second conversation was raised solely as a result of Respondent's own cross-examination. That Mack felt no subjective coercion or threat in either conversation is irrelevant. *Crown Cork & Seal Co.*, 308 NLRB 445, 450–451 (1992), and cases cited.

[5] Respondent appears to argue that Schibla was a low-level supervisor and thus had no capacity to commit unfair labor practices. It might be noted that in the second conversation, when Schibla directed Mack to follow him outside the building to have a conversation, Mack protested that he was extremely busy at the time. Schibla then did not hesitate to tell him: ''Well, I'm the boss. I want you to come with me now. I have something to talk to you about.'' (Tr. 315.)

3. Michael J. Skercheck, interrogation

As with the conversation, above, between Schibla and Mack, at the same time in mid-May 1993, that Schibla was unlawfully interrogating and threatening Mack, he directed Skercheck to come to his office and Schibla, as in the case of Mack, closed the door. Schibla told Skercheck that he guessed that Skercheck heard about the Union trying to get in and when Skercheck affirmed that he did, Schibla told him: ''If the union gets in here, you have a good chance of losing your pension and other benefits.''

To the extent that Schibla testified that he asked Skercheck only if he had any questions about the Union, to which Skercheck said that he had none (Tr. 617), I do not credit Schibla.

I conclude, as I have with regard to Schibla's interrogation of Mack, that Respondent, through Schibla, was engaged in systematic interrogation of and warnings to unit employees concerning their interests and the impending Board-conducted election and that such warnings or threats were unlawful. I also find, as I have, above, with regard, to employee Mack, that when Schibla told Mack that he had a ''good chance of losing [his] pension and other benefits,'' that was an unlawful threat within the meaning of Section 8(a)(1) and that the use of the phrase ''a good chance,'' like ''could,'' in the presence of contemporaneous unfair labor practices is not a defense under the closed-door, one-on-one, circumstances. Here, again, was no suggestion that in this conversation Schibla raised the theory of the loss of benefits through collective bargaining or in negotiations following union certification. See *United Technologies Corp.*, supra.

In view of the above findings, of unlawful interrogation and threats of loss of benefits with regard to Schibla's conversations with employees Billy Mack and Michael Skercheck, I need not reach and determine further allegations (complaint par. 5(c) and (d)) again concerning Schibla's conversations with employee Lindsay concerning a threatened loss of pension benefits or Schibla's alleged interrogation of employee Maxson, both occurring allegedly on or about May 14, 1993. Resolution of such allegations would not change my recommended Order to the Board.

4. Unlawful promise of benefit by Supervisor Vogel; paragraph 6(b)

Employee Billy Mack credibly testified that on or about June 7 or 8, Supervisor Vogel called him into his office and told him to shut the door. He told Mack, ''off the record,'' that he did not want to have Mike Skercheck in charge of the HVAC (heating ventilating and air conditioning). ''I would much rather have you in charge, and its a sure thing. My hands are tied because of this thing about the union. I can't do anything.'' Mack answered okay, ''Bob.'' (Tr. 284–285.)

In cross-examination, Mack admitted (Tr. 328–329) that he and Skercheck worked the same hours, get the same pay, and that there was no additional benefit in Mack being placed in charge of HVAC. Indeed, he had no idea of what the advantage was in being placed in charge. (Tr. 329.)

In the absence of General Counsel's suggesting exactly what benefit would occur from Vogel's declaration of his preference for Mack as being ''in charge'' (based on the presence of the union as the inhibiting factor) there is no promise of benefit based on abandoning the union or even lack of support of it.

It is a philosophical rather than a legal question as to whether, with no actual benefit, the alleged ''better position'' of being ''in charge'' is a promise of a ''benefit.'' I therefore recommend that paragraph 6(b) be dismissed. The cases cited by General Counsel, *LRM Packaging*, 308 NLRB 829 (1992); *Gerkin Co.*, 279 NLRB 1012 (1986); and *Continental Bus System*, 229 NLRB 1262, 1267–1269 (1977), are distinguishable. They involve promises of tangible benefits or relief from punitive conditions.

5. The alleged violations of Section 8(a)(1) by Supervisor Martin Giacobbe

Paragraph 7(a) alleges that on or about May 27, 1993, Supervisor Giacobbe (1) asked an employee what could be done to stop the Union; (2) solicited the employee to form an association of employees to deal with Respondent; and (3) solicited employees' complaints and grievances, promising employees improved benefits in terms and conditions of employment all in order to discourage them from selecting the Union as their collective-bargaining representative.

On May 27, 1993, while employee Michael Maxson was in his carpenter's shop, Supervisor Giacobbe, who enjoyed a close relationship with Maxson, telephoned him and asked (Tr. 35, et. seq.): ''Just between friends, what could the hospital do to stop the union?'' Maxson answered: ''At this point, I don't think anything could be done . . . the maintenance department has been dumped on far too long . . . they look at us [as] lower than housekeepers.'' Supervisor Giacobbe responded: ''Well, why don't you drop the union and start your own association?'' Maxson answered he knew nothing about ''associations'' and said he was satisfied with what the Union was doing for the employees at that point. (Tr. 36.) When Giacobee cautioned that the Union was only for power plant workers and not for maintenance workers, that they weren't going to do anything for the unit employees, Maxson answered: ''Well, that remains to be seen.'' At this point, Giacobbe suggested that the unit employees could come to him to relay their problems to management. Giacobbe would show Respondent what the employees' problems were and the employees would not have to worry about going face-to-face with management and suffer any intimidation. (Tr. 36.) Giacobbe then said that if the Union got in, he hoped that he and Maxson could still have a ''working relationship.'' Maxson answered that he did not see any reason why they couldn't; that it would only be a ''professional basis.'' (Tr. 36.) Giacobbe told Maxson that Respondent felt that the only reason that the employees wanted the Union was more money. Maxson told him that it had nothing to do with money; that the Union had not offered, and could not offer, more money; and that the employees wanted ''a contract, just like [president] Gribbin has.'' (Tr. 37.)

Lastly, Giacobbe asked Maxson whether ''things could change'' if ''we got rid of Vogel and Vic [Schibla].'' (Tr. 38.) Maxson answered that: ''Vogel wasn't the problem. Victor is our problem.'' Maxson called Schibla ''an unskilled imbecile . . . [who] has no respect for us and the guys have absolutely no respect for him.'' (Tr. 38.)

Maxson mentioned to Giacobbe that he regarded what was going on at the hospital as a ''joke'': that before the Union

came around, no one knew his name but that now everyone is tripping over their feet to say, ''Hi.'' (Tr. 39.)

Giacobbe did not testify.

To the extent Respondent defends on the ground that Maxson regarded Giacobbe's telephone statements as a ''joke'' (Tr. 42), the reference to ''a joke'' related to Maxson telling coemployees that it was ''a joke'' that Supervisor Vogel (not Supervisor Giacobbe in the above conversation) was asking Maxson and other employees to give the hospital 6 months to try to straighten out the problems and then to start up the Union again if the Respondent failed to solve their problems. (Tr. 42.) Maxson described the ''joke'' as Vogel's attempt to dissuade employees from supporting the Union; not what Vogel said. To this extent, Respondent's brief (Br. 30) mistakenly suggests that the word ''joke'' related to the Giacobbe conversation.

Maxson also told other employees that Giacobbe was making offers, doing what he was told (by Respondent) and that the employees ''are not going to take it serious.'' (Tr. 43.) That reference relates to the employees' evaluation of Giacobbe's ability and power to change things rather than to the seriousness with which Giacobbe made the offers of acting as a ''go between'' and inquiring what Respondent could do to ''stop the union.''

Respondent's reliance on *Globe Shopping City*, 203 NLRB 177, 180–181 (1973) is misplaced. In that case, a supervisor, engaging an employee in mock physical combat, feigned an armlock on the employee and told him that he was ''not telling [him] how to vote.'' The Board found that the supervisor's statement was made in the course of ''horseplay'' and the supervisor was ''kidding around.'' There is no evidence that Supervisor Giacobbe's telephone conversation with Maxson was ''horseplay'' or that Giacobbe was ''kidding around'' with Maxson. The most that can be said is that Maxson regarded Giacobbe as engaging in conduct at the behest of his superiors and was, himself, powerless to affect change. I conclude, therefore, that, as alleged, Supervisor Giacobbe's May 27 telephone conversation with Maxson violated Section 8(a)(1) of the Act in that he coercively inquired what could be done to stop the Union, solicited Maxson to form an association of employees to deal with Respondent rather than support the Union as the collective-bargaining representative, and also solicited the employees in using him as a go-between for their complaints and grievances and not have to face the intimidation of presenting these grievances to Respondent, all in order to improve their terms and conditions of employment. All such conduct violates Section 8(a)(1) of the Act as alleged.

6. Supervisor Giacobbe at the Point Pleasant facility on or about June 14, 1993

Paragraph 7(b) alleges that on or about June 14, 1993, at the Point Pleasant facility, Supervisor Giacobbe created the impression that employees' union activities were under surveillance; accused an employee of disloyalty; and unlawfully interrogated an employee because of his union sympathies. Employee John S. Sacko, a locksmith, testified that in the morning of June 14, 1993, Supervisor Giacobbe, at the Eldermed job, said he wanted to inform Sacko ''off the record''[6] that Vice President Dave Kaplan ''feels that [you are] an advocate of the union. So I wouldn't be put in a certain category, and that I should make amends with Dave.'' Sacko responded: ''I don't know what more Kaplan could want. I've been giving 100 percent since day 1.'' (Tr. 224.) Sacko recalls that Giacobbe said that Kaplan ''went out of his way to get [you your] job.'' (Tr. 225.)

Giacobbe then asked Sacko: ''Oh, by the way, are you for the union?'' (Tr. 225.) At that point, another employee called out to Giacobbe who turned away to answer the employee and Sacko walked away. (Tr. 225.)

Sacko had not been an open or active member or supporter of the Union. (Tr. 225–226, 236.) Giacobbe, as above noted, failed to testify.

Discussion and Conclusions

(1) To the extent that the complaint alleges that Supervisor Giacobbe's remarks to employee Sacko created the impression that Sacko's union activities were under surveillance, that allegation is supported only by Sacko's testimony that Giacobbe told him that Kaplan suspected him of being a union advocate. There was no suggestion that any of Sacko's union activities were the subject of that remark; merely Kaplan's suspicion concerning Sacko's union sympathies. Suspicion of status does not create an impression of unlawful surveillance. To that extent, therefore, I recommend that the allegation be dismissed as unsupported.

(2) The allegation includes an accusation of disloyalty: Giacobbe telling Sacko that Kaplan had ''gone out of his way'' to get Sacko a job and that therefore Sacko had to make amends to Kaplan. I conclude that the expression ''gone out of his way'' suggests that Kaplan's suspicion of Sacko's union support demonstrates, as alleged, an act of Sacko's disloyalty because the recommended conduct of Sacko making ''amends'' with Kaplan amounts to avowing ''loyalty'' to Kaplan based on Sacko's foreswearing the union. Imposing such an implicit condition in Giacobbe's recommended remedy violates Section 8(a)(1) of the Act. I find, in addition, not only is this assertion of disloyalty (based on union membership) to have been proved but I find a further act of unlawful assertion of ''disloyalty'' based on Sacko's support of the Union. Giacobbe told him that he should make ''amends with Dave . . . so I wouldn't be put in a certain category.'' (Tr. 224.) In order to make ''amends'' he would have to therefor eliminate the source of being in that ''certain category,'' i.e., withdraw his support from the Union.

The statement that Sacko, by making amends to Vice President Dave Kaplan, would ensure that he would not be put in a disfavored ''category'' of union supporters, comes within the rule of *Ichikoh Mfg.*, 312 NLRB 1022 (1993); In *Ichikoh Mfg.*, supra, a supervisor approached employees wearing union buttons and told them that if it was up to him, he would take off the buttons because it looked like the employees were trying to organize for the union. The supervisor did not instruct or order the employees to remove the buttons. His remarks to the employees showed that a decision, forcing the employees to remove the buttons, was not ''up to him'' and they could therefore continue to wear the but-

[6] Supervisor Giacobbe started his conversation, above, with his friend, Michael Maxson: ''Just between friends.''

tons. In that case, the Board, observing that an employer violates Section 8(a)(1) by prohibiting employees from wearing union buttons, found that the supervisor's remarks nevertheless conveyed the impression that the employer wanted employees to cease wearing the union buttons. Such an impression violates Section 8(a)(1) of the Act notwithstanding that the supervisor's statement did not amount to an order that the employees remove the union buttons. The supervisor's remarks were unlawfully coercive because:

> they conveyed the clear message that it was not a good idea to be perceived as being prounion and that union button-wearers would therefore be revealing themselves as members of a disfavored group. See *Certain-Teed Insulation Co*., 251 NLRB 1561, 1564 (1980). [*Ichikoh Mfg.*, supra at 1024.]

In the instant case, Giacobbe told Sacko that by being suspected of being a ''union advocate,'' Kaplan was identifying him ''as a member of a disfavored group'' (*Ichikoh Mfg*.) or, as in the instant case, placing Sacko ''in a certain category.'' I find that the coercive effect of being placed in a ''disfavored group'' by wearing union buttons, *Ichikoh Mfg.*, supra, governs the instant facts where Giacobbe told Sacko that, as a suspected union advocate'' he would be placed ''in a certain category.'' (Tr. 224.) I find that Giacobbe's imposition of an obligation to make amends in order to avoid being placed in the disfavored group is a requirement that Sacko abandon his disloyal union advocacy and show loyalty to Vice President Kaplan. As in *Ichikoh Mfg.*, the Sacko's support of the union as placed him in the disfavored group. Giacobbe's statement is coercive and violates Section 8(a)(1) of the Act as alleged.

It follows, in addition, that, after such coercive assertions of Sacko's disloyalty (and the method by which Sacko could make amends) that Giacobbe's subsequent question, whatever its innocence in other contexts, ''Are you for the union?'' (Tr. 225), constitutes coercive interrogation within the meaning of Section 8(a)(1) of the Act as alleged.

7. The alleged violation of Section 8(a)(1) by Vice President David Kaplan

Kaplan did not testify in this proceeding.

Complaint paragraph 8(a) alleges that on or about May 25, 1993, Kaplan unlawfully interrogated an employee (Thomas Brown) concerning the employees' union membership. In view of my findings of other unlawful interrogation by Respondent's supervisors and in view of the fact that it would not change the remedy in this case, it is unnecessary to analyze and decide the alleged coercive interrogation raised by the testimony of employee Thomas Brown.

Under paragraph 8(b) of the complaint, the General Counsel further alleges that on or about May 27, 1993, Vice President Kaplan solicited employee complaints and grievances, and promised them improved benefits in terms and conditions of employment in order to discourage them from selecting the Union as their collective-bargaining representative.

William Gaunt who, as above noted, at Respondent's May 14 pizza party meeting, angrily confronted pro-Respondent employee Dan Blunk (Tr. 53; ''asshole''); (Blunk as proemployer, Tr. 411), testified that he had been a lead engineer in Respondent's powerhouse for 3 years before being appointed chief engineer after the union election.

On May 27, 1993, his powerhouse supervisor (Bob Wissel) told him that Vice President Kaplan wanted to see him that afternoon. In Kaplan's office, Kaplan told him that he wanted to know of the power plant employee grievances. Kaplan said his request had nothing to do with management and the Union; it was a matter only between Gaunt and himself. Gaunt then gave Kaplan a list of grievances including the need for more overtime, greater evening-shift pay differentials; premium pay for weekends; drug plans for part-time employees, etc. Kaplan transcribed the grievances (Tr. 376) and told Gaunt that Respondent ''had made mistakes, and he wanted to rectify it or straighten them out.'' (Tr. 376.)

As alleged, Kaplan's statements to Gaunt in this May 27, 1993 conversation constitutes, prima facie, an unlawful solicitation of grievances coupled with an express promise to rectify them and thus improve benefits and conditions of employment. I conclude that Kaplan, contrary to Kaplan's statement, solicited Gaunt for the purpose of discovering unit employee grievances, rectifying them and thereby discouraging employees from thereafter selecting the union as their collective-bargaining representative.

Respondent defends on the assertion, that, prior to its receipt of the Board's Decision and Direction of Election (May 27, 1993), Kaplan had the above conversation with Gaunt (R. Br. 33). This conversation, therefore, occurred immediately *before* the receipt of the Board's May 27 determination of Gaunt's nonsupervisory status. Respondent asserts that prior to receipt of that document, and particularly at the time of the meeting between Kaplan and Gaunt, the supervisory status of Gaunt remained uncertain. Respondent asserted prior to the Board's determination, that Gaunt was a supervisor and Respondent treated him as a supervisor (R. Br. 33).

During the course of the hearing, I solicited from Respondent the citation of authority to support its defense that Respondent's good-faith, though mistaken, belief in Gaunt's statutory supervisory status provides a defense to Kaplan's remarks in the conversation of May 27 between Kaplan and Gaunt. Thereafter, by letter dated April 14, 1994 (not otherwise included in the record) Respondent submitted as its authority *Pillows of California*, 207 NLRB 369 (1973).

It has long been established that the burden of proof is on the parties seeking to exclude from the bargaining unit, on the basis of supervisory status, an employee otherwise includible. *Quadrex Environmental Co.*, 309 NLRB 101, 102 (1992); *Bennett Industries*, 313 NLRB 1363 (1994).

In *Pillows of California*, supra at 372, the Board held that, in view of a supervisor's prefatory remarks and good-faith belief that an employee was a supervisor, no coercive interrogation in violation of Section 8(a)(1) of the Act had occurred. In that case, however, the supervisor-interrogator went through a series of explanations of supervisory status and ''prefatory remarks'' concerning the duty of loyalty to the employer which a supervisor owes and which requires that a supervisor desist from union activity. *United Exposition Service Co. v. NLRB*, 945 F.2d 1057 (8th Cir. 1991).

In the instant case, contrary to Respondent's argument (R. Br. 33) there is no suggestion in the record that Respondent ever accorded the accolade of supervisory status on Gaunt or treated him as a supervisor prior to the union's organizational

effort commencing on April 12, 1993, or at any other time prior to the June 24 election. Nothing in the conversation between Gaunt and Kaplan suggests that Kaplan stated (or implied) that Gaunt was a supervisor; nothing in the records supports the conclusion that Kaplan or any other supervisor suggested that Gaunt was a supervisor; nothing in Respondent's brief alleges that there are facts in the record which suggest he was a supervisor or treated like a supervisor (see: Decision and Direction of Election, May 27, 1993; G.C. Exh. 1(d)). Rather, the record, in this regard, shows that Gaunt, along with all other unit employees, attended the skilled maintenance, powerhouse, biomedical employees May 14 unit pizza party meeting convened by Supervisors Vogel and Schibla. Gaunt, for instance, in the audience with his coemployees, was not called to stand with Supervisors Vogel and Schibla nor was he identified as the power house supervisor or asked to address the employees on behalf of Respondent. In short, he was treated just as any other unit employee was treated. Nor was he remonstrated with by Respondent, as a ''supervisor,'' for calling proemployer employee Dan Blunk an ''asshole'' in front of all the other unit employees when Blunk told the employees that the accession of the Union would mean that Respondent might subcontract all their jobs. In short, there is no evidentiary basis in this record for Respondent relying on a good-faith belief that Gaunt was a supervisor.

In *Permanent Label Corp.*, 248 NLRB 118 fn. 2 (1980), the Board distinguished *Pillows of California*, supra, on the ground that in that case, the administrative law judge found that the employer had a good-faith belief in the employee's supervisory status. In *Permanent Label Corp.*, supra, the Respondent had contrived a ''flimsy basis'' for such a belief. In the instant case, as above noted, there is simply no evidence to support a Respondent ''good-faith'' belief that, at any material time prior to the Kaplan-Gaunt conversation, Gaunt was a statutory supervisor, was treated as a supervisor, or was held out to be a supervisor (G.C. Exh. 1(d)). Rather, the meager evidence of record carries the implication, by Guant's attendance at the pizza party meeting along with all other unit employees, that he was a mere unit employee and so regarded by Respondent.

In the absence therefore, of any evidence suggesting Respondent's good-faith belief in Gaunt's supervisory status prior to this May 27 meeting between Kaplan and Gaunt, I conclude, in accordance with *Permanent Label Corp.*, supra, that Respondent had no good-faith belief of Gaunt supervisory status and that its defense herein is merely a ''flimsy'' attempt to escape its statutory obligation not to coercively deal with unit employees.

In any event, the Board's more recent view has apparently abandoned the ''good-faith belief'' defense and presently is that an employer acts at its peril when it seeks to chill the exercise of Section 7 rights by individuals who may later be found to be under the protection of the Act. *Shelby Memorial Hospital*, 305 NLRB 910 fn. 2 (1991). That Kaplan told this openly prounion employee that Respondent had made mistakes which it was attempting to rectify, it seems to me, was a device to blunt Gaunt's enthusiasm for the Union and to have Kaplan's message spread among Respondent's unit employees.

I conclude that Kaplan, in violation of Section 8(a)(1), unlawfully solicited employee grievances from an employee and promised an employee to rectify them in order to discourage employees from selecting the Union as their collective-bargaining representative.

8. Alleged violations of Section 8(a)(l) by Respondent's vice president, Charles Jarvis

In his speech of June 17, 1993, to all unit employees, Respondent's vice president, Charles Jarvis, allegedly promised to ''work out'' all of the employees' problems if they did not select the Union as their collective-bargaining representative. According to the General Counsel (par. 9, consolidated compliant), this constitutes a violation of Section 8(a)(1) of the Act in that it promises benefits conditioned on the employees' abandoning their union support.

Employee Dominick Bonafide testified that, along with 10 or 12 other unit employees, he attended, by direction of a Respondent memorandum, a June 17, 1993 meeting along with President Gribbin, Assistant Vice President Keane, and Vice President Jarvis.

Bonafide testified that President Gribbin, just 1 week before the election, told the employees that the former maintenance supervisor, John Hopler (succeeded by Robert Vogel), had failed to communicate that there were problems in the maintenance department. At the point, employee Bill Bradley said that Gribbin should have known that there were problems because Bradley wrote letters on the problems and that nothing was ever done; but now that the Union came in, the Respondent called a meeting in the Board room and wanted to hear all about their problems. (Tr. 336.) Vice President Charles Jarvis answered Bradley by saying (Tr. 337): ''All I can tell you is if you vote no on the 25th [of June] then we can work all these problems out.''

On cross-examination, Bonafide testified that he could not recall President Gribbin saying that he could not make any promises to the employees. (Tr. 342.) But he did recall that at the beginning of the meeting, Gribbin said that Respondent could not ''do anything now'' (Tr. 343) and that Respondent's ''hands are tied.'' (Tr. 343.) Bonafide recalled that Jarvis' statement was made toward the end of the meeting. After Jarvis made the above comment, Bonafide testified that Gribbon did not say that the employees should not ''walk away and consider Mr. Jarvis' statement as a promise.'' (Tr. 344–345.)

Charles Jarvis testified that at the end of this June 17 meeting, at which Respondent solicited employee grievances, he said: ''When this is all over, we can address your issues.'' He testified that Gribbin then immediately said: ''This should not be construed as a promise, but we can and will not make any promises to the employees.'' (Tr. 557.) Gribbin testified in support and corroborated Jarvis' testimony. (Tr. 583.)

Discussion and Conclusions

I have already found, above, with regard to the May 14, 1993 postpizza party conversations between Supervisor Vogel and employees Maxson and Cilento, that Vogel promised improved benefits in violation of Section 8(a)(1) of the Act. I have also found that on or about May 27, Supervisor Giacobbe made unlawful promises of improved benefits upon the solicitation of complaints and grievances from employee Maxson. I have further found that there was an unlawful

promise of improved benefits by Vice President Kaplan in his May 27 conversation with employee William Gaunt, all in violation of Section 8(a)(1) of the Act. I therefore find it unnecessary to resolve the question of whether Jarvis' June 17 statement to the assembled unit employees wherein, as employee Bonafide testified, he told the employees that if they voted against the Union then the Respondent could ''work all these problems out'' (Tr. 337), constitutes an unlawful promise of benefits.

Bonafide's testimony contradicts in large part the testimony of Jarvis and Gribbin. There also remains the legal question of whether, even if Gribbin's testimony is accepted (that he immediately told the employees that they should not construe what Jarvis said as a ''promise'' of benefits), that the retraction was sufficient as a matter of law, *Passavant Memorial Hospital*, 237 NLRB 138 (1978); *Agri-International*, 271 NLRB 925 (1984).[7] There was the further question whether Gribbin's apparent retraction is sufficiently enigmatic and ambiguous as to make it ineffective. Thus, assuming, arguendo, that Gribbin said that the assembled unit employees should not construe Jarvis' statement as a promise of benefits, the question remains what should they construe it as? He did not inform them what the employees' construction should be. Ordinarily, it might be expected that if the employer's chief executive officer or his chief operations officer makes unlawful promises to employees during an antiunion campaign speech, he may not then, at the end, tell them with impunity that they should not construe the promises as promises.

Violation of Section 8(a)(3)

The Discharge of John Cilento

Background

John Cilento was twice employed by Respondent, the first time as a maintenance mechanic in the period 1987–1990 when he did plumbing. He was never disciplined during that period and resigned in order to enter into his own business. During the period 1990–1992, he received a plumbing license in the State of New Jersey. He was rehired by Respondent as a maintenance mechanic on or about December 30, 1992, and was discharged on June 9, 1993.

On being rehired in the maintenance department, December 30, 1992, as a probationary employee, the departmental supervisor, Hopler, told him there was something in his personnel file which recommended against his being rehired. Hopler nevertheless told him that it was ''no big deal'' and that he should not worry about it. Among other supervisors who interviewed him besides Hopler were Maintenance Department Supervisor Robert Vogel and Vice President Dave Kaplan. In interview discussions, Hopler and Kaplan told him that they wanted a licensed plumber and were particularly desirous of using a licensed plumber on their outside jobsites. Kaplan and Hopler told Cilento that they wanted a professional atmosphere, with licensed people in the maintenance department. Cilento reported to Hopler (director of the engineering department) and Supervisor Vogel (not a licensed plumber). After Hopler left, in or about mid-April, 1993, Victor Schibla became a supervisor in the maintenance department assisting Vogel. Neither Vogel nor Schibla hold any trade licenses or certificates. On one occasion, Vice President Kaplan told Cilento that there was a great deal of anticipated work to be done outside the hospital facilities and Respondent needed a licensed plumber. Indeed, Kaplan called Cilento Respondent's ''plumber of the future.'' (Tr. 94.)

Respondent evaluates its probationary employees twice in the 6-month probationary period: first at the end of 3 months' of employment; second at the end of the 6-month probationary period. Respondent's first evaluation of Cilento (G.C. Exh. 2), for the period December 30, 1992, to March 30, 1993, signed by Supervisor Vogel (and Cilento) on March 31, 1993, is entitled ''New Employee Progress Report.'' It provides for evaluation in 10 categories of work and conduct measured in 4 grading levels running from ''above average'' (the highest level) to ''average,'' then to below average'' and finally to ''unacceptable'' as the fourth category. In all 10 categories[8] Vogel rated Cilento in the highest grade: ''above average.'' Under the heading ''recommendation,'' which provides three categories (a. termination; b. needs improvement; and c. employment should be continued), Vogel wrote that Cilento should be continued in employment. When Cilento and Vogel discussed this evaluation, Vogel told him that he was doing an excellent job and that Respondent was very happy with him. (Tr. 87.)

Cilento regularly received work orders (work ''requisitions'') from Supervisors Vogel, Schibla, and Martin Giacobbe. In addition to specific work orders for repair and other functions, Respondent maintained a separate preventive maintenance program, scheduled in books maintained by Respondent.

During the 6 months of Cilento's second employment, until his termination June 9, 1993, he worked predominantly at Respondent's Point Pleasant facility and at other ''satellite'' locations including Respondent's facility for senior citizens located about 5 miles from the Point Pleasant Hospital known as the ''Eldermed'' facility. That facility, originally a part of a group of shopping center retail stores including a restaurant, was being renovated to accommodate Respondent's new facility. Cilento, among other activities, also built a complete plumbing shop in Respondent's Point Pleasant Hospital facility. Over a period of months commencing with his second employment, he expanded a closet-like plumbing storage area into a full-fledged plumbing supply facility by knocking down walls (with the help of carpenter Maxson) and installing shelving, racks, benches, and vises. The new facility was well stocked and designed to

[7] In addition there is the underlying problem whether, in view of certain prior meetings with employees, Respondent at the June 17 meeting was merely continuing a lawful past practice of soliciting employee grievances during an organizational campaign, *Lasco Industries*, 217 NLRB 527 (1975), or, in this meeting limited to unit employees, was unlawfully significantly altering its past practice, *Carbonneau Industries*, 228 NLRB 597, 598 (1977). If Respondent, here was significantly altering its past grievance solicitation practice, the June 17 solicitation would be unlawful and Gribbin's asserted repudiation of Jarvis' ''promise of benefits'' would be rendered irrelevant. Cf. *House of Raeford Farms*, 308 NLRB 568, 569 (1992).

[8] The 10 categories are (1) quality of work; (2) quantity of work; (3) ability to learn; (4) teamwork; (5) compliance with instructions and regulations; (6) dependability; (7) attendance; (8) initiative; (9) appearance; and (10) adaptability.

take care of any plumbing emergency. During and after its construction, Vice President Kaplan and Supervisor Schibla often told him that he had performed an excellent job; that Respondent was very happy with it; and inquired whether he needed any other materials. They told him that he should not hesitate to so inform them.

A. *The Prima Facie Case of Unlawful Discharge*

The Union filed its petition for certification in Case 4–RC–18096 on April 12, 1993. The Union's unfair labor practice charge alleging violation of Section 8(a)(1) of the Act (soliciting employee grievances and promising increased overtime opportunities), filed on May 10, 1993, was served on Respondent by certified mail on May 12, 1993. The return receipt showing actual service, signed by Respondent's president, John Gribbin, bears no date. In addition, the record is obscure as to precisely when the mid-May ''pizza'' meeting was held, under the direction of Supervisors Vogel and Schibla, directed only at the unit employees subject to the Union's petition. Although there is no dispute that it occurred sometime in mid-May 1993, the General Counsel suggested, and Respondent did not contest, that it happened on or about May 14, 1993. (Tr. 109.) It was during that meeting, as I have found, above, that Cilento's rebuttal to employee Blunk's argument (against supporting the Union), clearly identified Cilento as a union supporter and a former union member. It was in this conversation, as above noted, nowhere denied by Vogel or Schibla, that Vogel inquired into Cilento's prior union affiliation and experience. Thus, on the uncontradicted and credited evidence, I find that Respondent had predischarge knowledge of Cilento's prounion stance and his position as a union supporter among unit employees. Furthermore, his post pizza party conversation with Schibla and Vogel, in the presence of coemployee Maxson, wherein Vogel, inter alia, asked them to convince the other unit employees to forego support of the Union and give Respondent another chance to hear employees' grievances and work out problems, also demonstrates that Vogel knew of Cilento's position as a union supporter, indeed his having a potential power of persuasion over the union activities of his fellow unit employees. Lastly, when Vogel then heard Maxson and Cilento ask him why they should give up support for the Union, Vogel had further knowledge of Cilento's prounion position by May 14.

With regard to the element of union animus, I have found, above, that Respondent, through its supervisors, including its Vice President Kaplan and its maintenance department Supervisor Vogel, engaged in numerous unfair labor practices in violation of Section 8(a)(1) of the Act. Those conclusions, alone, demonstrate union animus and must be taken into account in relation to Respondent's June 9, 1993 discharge of Cilento.

In determining union animus, I cannot avoid noting the testimony of Respondent's president, John Gribbin. Whatever else his testimony showed, he demonstrated a personal animus against the employees attempting to organize in the maintenance department. He particularly denied that he ever took the employees' attempt to organize the maintenance department ''personally.'' (Tr. 585.) Rather, he testified that in his three June 1993 meetings with unit employees, he took ''personally'' only the Union's misrepresentations concerning his salary relations with Respondent. (Tr. 586.) As a result of this testimony, General Counsel produced Gribbin's letter, dated June 2, 1993, distributed to unit employees (G.C. Exh. 8), urging employees to vote against the Union. With regard to Gribbin's personal feelings on the Union's organizational effort, President Gribbin stated in the letter: ''Some people have accused me of taking this Union petition personally. Well, they're right and I cannot help it.''

In short, I find that President Gribbin gratuitously and falsely attempted to deny a personal animus against the employee's organizing effort. His subordinate supervisors could be expected to refrain from manifesting contrary attitudes.

The June 9, 1993 Discharge

Cilento credibly testified that although the union organizing drive started in March 1993, he intentionally played no part in it, fearful, as a probationary employee, of not surviving probation because of his being identified as a union supporter. Nevertheless, although Respondent maintains an ''employee handbook'' (G.C. Exh. 6) providing, inter alia, a disciplinary system including the giving of oral and written warnings (G.C. Exh. 6; par. 6.2), there is no dispute that Cilento never received a written or oral warning for any defect in work or conduct during his second term of employment with Respondent, commencing December 30, 1992, regardless whether the handbook discipline applied to probationers.

As above noted, Cilento's second and final probationary evaluation, occurring at the end of 6 months of employment, was due on June 30, 1993. Respondent, however, executed the memorandum supporting the evaluation a month early, on June 1, 1993 (G.C. Exh. 4).

There is also no dispute that Respondent's payday is Thursday of each week; and that the pay period covered by such payday is for the prior 2-week period of Sunday through Saturday. Thus, Respondent discharged Cilento on Wednesday, June 9, not only without regard to its regular payday but in midpay period. The necessary inference of the abruptness of the discharge, absent any prior discipline, or sudden malfeasance, and in the presence of his distinguished initial evaluation, was never explained or refuted.

On Wednesday, June 9, 1993, at about 1:30 in the afternoon, Vogel ''beeped'' Cilento to come to his office. As Cilento entered the office, Vogel told him: ''I guess you know what this is about'' and handed him an envelope. In the envelope were two documents: Respondent's final, 6-month unsigned evaluation (G.C. Exh. 5) of Cilento as a probationary employee; and a memorandum, dated June 1, 1993 (G.C. Exh. 4), supplying the supporting data for the unfavorable evaluation together with a termination date of June 4 (sic).

According to Cilento, he responded to Vogel's question (''I guess you know what this is about'') by stating that he did not know. Cilento says that Vogel then said: ''With all the bullshit that is going around here, I have to be the bad guy.'' It was at that point that Cilento opened the envelope and withdrew and inspected the termination notice (G.C. Exh. 5) and the supporting memorandum (G.C. Exh. 4). Cilento testified that he asked Vogel why he was being terminated and Vogel answered that it was because ''we are not using your plumbing license like we wanted to at the Eldermed job.'' (Tr. 131.) Cilento responded that he had been willing to do the work at the Eldermed job; that it was

all set but that Respondent then hired an outside contractor. At this point, Cilento asked Vogel who had written the memorandum (G.C. Exh. 4) and Vogel said that he did not know but thought it was the employee relations department. Cilento then left but, on rereading the supporting memorandum (G.C. Exh. 4), and the termination notice (G.C. Exh. 5), noticed that there were no signatures on the documents and returned to Vogel for signatures. At that time, according to Cilento, Vogel said that: ''I guess I will be the one going to court.'' Vogel then signed and dated both documents. He dated both documents June 9 notwithstanding that the memorandum (G.C. Exh. 4), supporting a discharge no later than June 4, is dated June 1, 1993.

Vogel testified that he told Cilento that he was terminated and no longer needed; that it was ''just a matter of all the time talking to you . . . about the work requisitions . . . and giving Vic [Schibla] a hard time.'' (Tr. 756–757.) Vogel further testified that when Cilento returned to have the unsigned form signed, Cilento rather than himself, said: ''I'll see you in court.'' I specifically discredit Vogel's testimony on this point.

On the above credited testimony of Cilento, and Maxson, and on all the circumstances of the case, I find that the General Counsel, by a preponderance of the credible evidence, has proved that Respondent, prior to the June 9 discharge, had *knowledge* of Cilento being a supporter of the Union; that Respondent (including Supervisors Vogel, Schibla, Giacobbe, and Kaplan) by virtue of commission of prior and contemporaneous unfair labor practices, manifested union *animus* against the Union, in general, and Cilento, in particular; that Respondent's president (Gribbin) harbored a personal union animus against its employees' organizing activities in the skilled maintenance unit; that Respondent discharged Cilento in midpay period prior to payday, in the absence of any sudden precipitating event or oral or written warnings concerning his work or conduct during his entire second (or any other) term of employment, and in the presence of an entirely outstanding work evaluation in the first 3 months of his employment; that this abrupt discharge, before the election, following unfair labor practices and Respondent's identification of Cilento as an outstanding union supporter with apparent persuasive powers over his coemployees, all constitute evidence supporting a finding of a prima facie case: that Respondent's June 9, 1993 discharge of Cilento violated Section 8(a)(1) and (3) of the Act, as alleged.[9]

B. *Respondent's Defenses*

1. The documents comprising the Respondent's termination of Cilento; the supporting memorandum (G.C. Exh. 4) and the termination document (G.C. Exh. 5)

The termination notice (G.C. Exh. 5) carries on its face Vogel's signature and his newly inscribed date, June 9, 1993. The rating period appearing on its face is from December 30, 1992, to June 30, 1993. Manifestly, a document dated June 9, 1993, cannot cover a rating period ending 3 weeks later (June 30, 1993). Since Respondent's evaluation (G.C. Exh. 2) of Cilento together with Vogel's and Kaplan's remarks, for the period ending March 31, 1993, was entirely outstanding, it is difficult to understand how, for the entire 6-month period, in the June 1993 evaluation, *none* of his work or conduct was above average; that in only three categories was his work *average* (quality of work,[10] ability to learn and appearance); that two of the categories were *below average* (teamwork and adaptability) and that four categories were ''unacceptable'' (quantity of work, compliance with instructions or regulations, dependability, and initiative).

Be that as it may, Vogel testified that he recommended the termination of Cilento well before the June 9 date appearing on the termination document (G.C. Exh. 5) and, indeed, even before the June 1 date appearing on the supporting memorandum which, on Vogel's recommendations, was crafted by the personnel department (G.C. Exh. 4).

As I understood Vogel's testimony (Tr. 757–762), Vogel had already determined to terminate Cilento before he entered into a hospital for catheratization. (Tr. 759.) Before he entered the hospital, he spoke with the personnel department, particularly Assistant Vice President Keane, with his recommendation and the supporting grounds to discharge Cilento. Since he spoke with Keane and gave her his recommendation for the discharge prior to his entry into the hospital and prior to the time that the supporting memorandum was typed up (June 1), it appears to me that he had recommended the Cilento discharge to Assistant Vice President Keane prior to June 1 when either the maintenance department clericals or the personnel department actually memorialized the reasons for the discharge (G.C. Exh. 4). In short, I find that toward the end of May 1993, Vogel decided to discharge Cilento because Vogel had already recommended the termination to the personnel department prior to his entry into the hospital and the memorialization of the reasons for an anticipated June 4 discharge was not typed up until June 1 (G.C. Exh. 4, June 1, 1993). I conclude, therefore, that notwithstanding that the discharge date was June 9, 1993, and notwithstanding that the memorialization of the discharge, signed by Vogel on June 9, was the same date as the termination notice itself, Vogel's decision to terminate Cilento occurred prior to June 1, 1993, and appeared to be sometime during the last week of May 1993. That being the case, it is provident to inquire into the reasons (advanced in late May) for the discharge propounded in the supporting memorandum (G.C. Exh. 4), dated June 1, 1993.

The first reason advanced in the supporting memorandum (G.C. Exh. 4), is that Cilento never showed up at an offsite job assignment on April 23, 1993. There is no dispute that this was the Eldermed facility on which Cilento and other employees worked from time-to-time. Dozens, and perhaps a hundred, pages of testimony were devoted to the question of whether Cilento actually worked on the Eldermed job on

[9] In the period 1991 to June 24, 1993, Cilento was the only probationary employee discharged for poor job performance. (Tr. 490–491.) The only other probationer who was discharged in this period was discharged for drunkenness (Tr. 483–486) and he was discharged only because he refused to enter Respondent's alcohol rehabilitation program. (Tr. 486.)

[10] With regard to ''quality of work,'' Respondent, at the hearing, contradicted even this modest positive standard and declared that Cilento was discharged for ''incompetence.'' (Tr. 288.) This contradiction, in turn, contradicted Schibla's estimation of the quality of Cilento's work in the final evaluation period which was ''all right.'' (Tr. 633.)

April 23, 1993. It should be noted, however, that it was not only in the supporting memorandum that Respondent took the position that on April 23 Cilento never showed up at the Eldermed job; rather, extensive testimony of Vogel and Schibla was replete with assertions demonstrating their doubts that he ever showed up at the job. It is unnecessary, nevertheless, to inquire into or analyze this issue. It is sufficient to note that Vogel's and Schibla's vague testimony on this point damaged their credibility and that, ultimately, Vogel admitted, under oath, that this reason advanced in the supporting memorandum—that Cilento never showed up at that Eldermed job on April 23, 1993—was ''incorrect.'' (Tr. 773.)[11] It is unnecessary in disposing of this defense, to determine whether this ''incorrect'' reason was known to be false prior to Vogel and Schibla giving their testimony under oath. In any event, I credit Cilento's testimony: that he worked at the Eldermed job on April 23, 1993; and I discredit Respondent's admittedly ''incorrect'' defense.

The second of the four reasons in the supporting memorandum is that on April 26, 1993, Cilento was found sleeping in his shop by Vice President Dave Kaplan. The only evidence with regard to Cilento being asleep (Respondent failed to regard this act as serious enough to engage its disciplinary machinery if it applied to probationers or, if not, to manifest some serious displeasure) is the testimony of Supervisor Vogel. He testified that it was not only Vice President Kaplan who caught Cilento asleep in his plumbing shop, but that he himself also caught him sleeping. (Tr. 754.) Vogel testified that he could not remember the month in which it occurred (Tr. 755) but that he found Cilento asleep in his chair in the plumbers' shop with Cilento telling him that he was not feeling well. Vogel said he remonstrated with Cilento and told him that he should have spoken to Vogel who perhaps would have let him go home. Although Vogel testified that he regarded his discovery of Cilento sleeping during working hours to be important to him, he could not explain why he did not put it into the recommendation to discharge Cilento that he forwarded it to Assistant Vice President Keane (Tr. 774) or even issue some sort of discipline. In view of Cilento's failure to deny Vogel's testimony, even in rebuttal, I credit Vogel that he did find Cilento asleep; that Vogel believed that Cilento was not feeling well; and that this event, whatever its date, was considered insignificant by Vogel. Since Vogel could not remember the date, it may well have been in the first 3 months of Cilento's employment when Vogel rated him so highly.

With regard to Vice President Kaplan allegedly finding Cilento asleep, the only credible testimony of record comes from Cilento himself. Cilento testified that in late April 1993, he was in the plumbing shop during lunch hour with feet up on the desk. Kaplan came in and, as Cilento withdrew his feet from the desk, Kaplan said, ''[N]o, stay there.'' They spoke for 5 minutes about how nice the plumbing shop was; whether Cilento needed anything further and Cilento's evaluation of a new employee. About 2 weeks to a month later (i.e., sometime in May 1993), Vogel approached Cilento and told him (Tr. 105–106) that he had ''saved your ass.''

When Cilento asked how that occurred, Vogel said that Vice President Kaplan caught him sleeping. Cilento told Vogel that he did not know what he was talking about and Cilento immediately went to see Kaplan. Kaplan told him that when Kaplan entered the office, Cilento was sleeping. Cilento denied it and said that he was not sleeping and had looked Kaplan right in the face as he had walked into the office. Cilento said that he was on lunchbreak and Kaplan answered that if he was on lunchbreak he should have been in the cafeteria.

Not only did Cilento *not* receive any oral or written warning concerning the above sleeping incident with Vogel and *not* only did he not receive one with regard to the same or similar incident with regard to Vice President Kaplan, but Kaplan never testified in this hearing. Under these circumstances, I do not credit Vogel that Kaplan had caught him sleeping; and I do not credit his assertion that he had ''saved your ass'' because of that occurrence. Particularly in view of Kaplan's failure to testify to deny Cilento's version, I credit Cilento. I therefore find, consistent with Cilento's testimony, that Kaplan never found Cilento asleep; and that Vogel's testimony that he had ''saved your ass'' because of this incident is not credible. I find, in any event, that even if Kaplan found Cilento asleep, Kaplan's failure to issue any type of warning or discipline indicates that Kaplan regarded the matter to be as insignificant as Vogel did when he, too, found Cilento asleep.

Ultimately, Vogel's testimony regarding what Kaplan found is the purest hearsay. Kaplan's failure to testify (on this or any other question), under these circumstances, is dispositive of my crediting Cilento's version.

The *third* basis on which Respondent discharged Cilento is the assertion that on May 20, 1993, he was found ''hanging around the shop—not working on assignments.''

Cilento kept a daily log of the work he performed. Cilento credibly testified, and the log confirmed, that in the period May 18 through May 21, he was busily engaged, sometimes with a coemployee, in the installation of a certain sink at the direction of Supervisor Schibla. Schibla, however, directed Cilento to install the wrong sink in the wrong place. On May 20, Cilento testified that he was very busy that day and was called off the installation of the wrong sink and told to do other jobs.

Respondent went to considerable effort, attempting to undermine Cilento's veracity, to show that he tampered with the log by interlineating matter into the log to show that he was busy in the period commencing May 19, 1993. (Tr. 793, et. seq.) In order to do so, Respondent requested, and General Counsel produced, the original of the log kept by Cilento. Evidently the original log showed no tampering and the matter was dropped. (Tr. 866.) Employee Sacko, who worked with Cilento in the installation of the wrong sink, testified that they both worked at a steady pace except for interruptions caused by Cilento being contacted by beeper to work on other assignments.

Ultimately, Cilento disconnected the wrong sink and connected the correct sink into the proper place. In addition contrary to Respondent's assertion, I credit Cilento who testified that the work was completed on May 21 rather than being incomplete as late as May 25, 1993 (G.C. Exh. 4).

[11] Schibla (Tr. 642–643) and Vogel (Tr. 740–743) testified that notwithstanding that Cilento allegedly never showed up at the Eldermed job, they never asked him why he failed to show up. They asked him only why he was so late in *returning* to the Point Pleasant facility.

In short, Cilento's credited testimony shows that he was busy for the entire period May 18 through 21, 1993. This testimony was corroborated by employee Sacko.

Respondent relies exclusively on the testimony of Supervisors Schibla and Vogel to show that Cilento was hanging around, socializing with coemployees, and did not perform his work. No other witness was produced to support this testimony. More important, however, Schibla repeatedly testified that he and Vogel kept notes and memoranda regarding Cilento's failure to perform his work. Indeed, Vogel and Schibla kept an index of 3 by 5 cards demonstrating Cilento's poor performance. (Tr. 626–628.) It appeared, at one point, that Schibla testified that he himself did not keep notes but merely supplied the information to Vogel. (Tr. 626.) On another occasion, he said he wrote notes. (Tr. 634.) On one occasion, with regard to Cilento's alleged failure to perform preventive maintenance, Schibla testified that he told Vogel of the incident and Schibla himself memorialized it. (Tr. 634.) In particular, Schibla said that on April 7 or 8, Cilento refused to perform preventive maintenance; and that Cilento was sitting around in his shop at the time he refused to do the work. (Tr. 695.) On the other hand, Cilento's log shows that in the period April 6 through 9, he did in fact perform preventive maintenance work.

In view of Cilento's otherwise credible testimony, the corroborative entries in his daily work log (R. Exh. 4), but particularly in view of Respondent's failure to produce Vogel's and Schibla's notes of Cilento's failure to perform assigned work, I do not credit Respondent. Rather, I draw an adverse inference against Respondent's testimony with regard to Cilento's failure to perform work because of Respondent's failure to produce Vogel's and Schibla's notes to support their own testimony. Accordingly, I infer that if produced, the notes would fail to support Respondent's position wherein Cilento was allegedly failing to perform his work. *PRC Recording Co.*, 280 NLRB 615, 626 (1986), enfd. sub. nom. *Richmond Recording Corp.*, 836 F.2d 289 (1987). Compare *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972), with *Hitchiner Mfg. Co.*, 243 NLRB 927 (1979). See *International Automated Machines*, 285 NLRB 1122 (1987).[12]

As above noted, Respondent's June 1, 1993 memorandum supporting a discharge to take place no later than June 4 but which ultimately occurred on June 9, lists ''just a few incidents'' of Cilento's misbehavior, all of which incidents proved to be without merit (April 23, 1993, failure to show up at the Eldermed job; found sleeping in his shop by Vice President Kaplan on April 26, 1993; May 20, 1993 hanging around the shop and not working; and May 25, 1993, failing to fulfill assignment—installation of a sink). At the hearing, however, Respondent, for the first time, added a further defense on which it supports Cilento's discharge: that in whole or in part, Cilento was *incompetent*. (Tr. 288.) This incompetence necessarily must have occurred after Respondent's March 31, 1993 evaluation (G.C. Exh. 2). In that 90-day period (December 30, 1992, to March 30, 1993), the first 90 days of Cilento's probationary period, the quality and quantity of his work, along with his ability to learn, dependability, initiative, and adaptability were all above average. As above noted, none of his work or conduct was merely average; all was ''above average.'' Thus, the incompetence must have started sometime after March 31, 1993.[13]

Cilento testified, that it took him months to convert a closet into an organized plumbing shop so that any plumbing emergency could be met. In late April, Vice President Kaplan complimented him on it, supra. Certainly his work did not deteriorate in later April when he cleaned out a discharge line in the kitchen which hampered the work of the entire kitchen. (Tr. 102.) Vogel inspected this work and said that Cilento had done a very good job. (Tr. 102.) Vogel did not deny this Cilento testimony. As General Counsel further notes, in late May 1993, Cilento discovered and laboriously repaired a hot water leak in the coffee shop which earned Schibla's particular praise. (Tr. 101.) Schibla did not controvert this testimony. There is no dispute that Cilento, a licensed plumber in the State of New Jersey, passed a written examination in order to gain the license.

As in the case of Respondent's above preexisting defenses, (G.C. Exh. 4), I find this newly minted defense of Cilento's ''incompetence,'' raised for the first time at the hearing, to be also without merit. Not a single instance of poor work, much less incompetance, was mentioned by Respondent's witnesses. Indeed, there is an inference to be drawn here of a certain desperation in Respondent's efforts to denigrate the work, conduct, and cooperativeness of an otherwise fully competent employee.

The further one inspects Respondent's defenses, the more unpersuasive they appear to be. Since the decision to terminate Cilento was purely the determination of Supervisor Vogel (Tr. 737–738), and since Vogel admitted that one or more of the reasons appearing in the memorandum supporting the discharge (G.C. Exh. 4) was ''incorrect'' it would appear particularly relevant to determine whether, in view of Cilento's alleged ''hanging around'' and numerous alleged failures to perform and complete his work, Vogel ever actually confronted him; in a case of apparently important malfunction (a backed up toilet); whether he told Cilento that his work order showing that the job was completed was false or at least erroneous. Thus, when Vogel, on the witness stand, was confronted with the naked question whether he ever told Cilento: ''You signed off on this [job] and you didn't do it,'' Vogel responded: ''I can't say definitely yes. I can't say that [Schibla] did it either. Nor did I instruct Schibla to confront him.'' (Tr. 745–746.) Not only did Vogel admit Schibla never inspected Cilento's work (contrary to Cilento's testimony regarding Schibla's praising Cilento's work), but Vogel testified that he did not regard some of Cilento's alleged failures to perform to be ''serious.'' (Tr. 746.) While he did not regard Cilento to be a chronic liar, Vogel stated that even one instance of a failure to perform, as Cilento allegedly said he had performed, would be one instance too many. (Tr. 747.) Although Schibla testified that he himself did not check Cilento's work in preventive maintenance (Tr. 710), Vogel said that he did check it and most of the time Cilento had completed preventive maintenance. He said he

[12] Among other relevant, but unanswered, questions are whether similar notes and memoranda were compiled against any other probationary employee and whether Respondent was merely ''building a file'' against Cilento after it discovered his support of the Union. See *Quebecor Group*, 258 NLRB 961 (1981); *Cherry Hill Convalescent Center*, 309 NLRB 518 (1992).

[13] As noted in a prior footnote, Respondent's new defense, never before mentioned, contradicts all its evaluations of Cilento (G.C. Exhs. 2 and 5) and Supervisor Schibla. (Tr. 633.)

spoke to Cilento many times about Cilento's ''work ethics'' but could not recall the dates. (Tr. 747–748.) Such testimony is not encouraging with regard to establishing Vogel's and Schibla's veracity and crediblity.

I conclude on the basis of Cilento's and other credited testimony and Respondent's ''incorrect'' and otherwise unproven or nonexistent defenses, including the newly minted allegation of Cilento's incompetence, not only that General Counsel's prima facie case of Cilento's discriminatory and unlawful discharge was proved, but that Respondent failed to produce preponderant credible evidence to rebut General Counsel's evidence or to prove that Respondent, in any case, would have discharged Cilento regardless of his union activities. *Wright Line*, 251 NRLB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–401 (1983); *NKC of America*, 291 NLRB 683 fn. 4 (1988). In the face of General Counsel's proof, Respondent failed to bear its burden, to prove by a preponderance of the credible evidence, that the General Counsel's facts were unsupported or, in the alternative, that Respondent would have taken the same action against Cilento regardless of his protected or union activities, *Merillat Industries*, 307 NLRB 1301 (1992). In view of Cilento's exemplary work record through March 31, 1993; his never having been given a warning for work or conduct; (whether or not Respondent's disciplinary system applied to probationary employees); Respondent's ''incorrect'' defense with regard to Cilento's failure to show up at the Eldermed job; its new and unproven defense of Cilento's incompetence; its failure to support its defenses that Cilento failed to do preventive maintenance work or install a sink; that he had been found asleep by Vice President Kaplan; Respondent's failure to produce its notes recording Cilento's failures; Cilento being the only probationary employee between 1991 and the June 24, 1993 election ever discharged for poor work; all of these unproven faults and shifting and unproven defenses demonstrate that the discharge was pretextual.[14] The preponderant credible evidence thus necessarily establishes the unlawful motive in Cilento's discharge. *Best Plumbing Supply*, 310 NLRB 143 (1993).

CONCLUSIONS OF LAW

1. Respondent, Medical Center of Ocean County, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. International Union of Operating Engineers, Local 68-A, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, in the period commencing May 14 through June 14, 1993, by its supervisors, Schibla, Vogel, Giacobbe, and Kaplan, in violation of Section 8(a)(1) of the Act, unlawfully and coercively interrogated its maintenance employees, unlawfully promised them improved benefits, threatened them with loss of benefits, and solicited employees to convince other employees to vote against union representation, all with the object of unlawfully defeating the Union's attempt to organize Respondent's skilled maintenance employees.

4. In or about the period May 27 and June 14, 1993, Respondent, by its Supervisor Martin Giacobbe, unlawfully asked an employee what could be done to stop the Union; solicited the employee to form an association of employees in order to prevent the Union from organizing Respondent's employees; solicited employee complaints and grievances and promised skilled maintenance employees improved benefits in order to discourage them from selecting the Union as their collective-bargaining representative; and unlawfully warned an employee to make amends and forego further support of, the Union because Vice President David Kaplan suspected the employee of being a union supporter, all in violation of Section 8(a)(1) of the Act.

5. On June 9, 1993, in violation of Section 8(a)(3) and (1) of the Act, Respondent unlawfully discharged its employee, John Cilento, because he supported and engaged in the activities in behalf of the Union and in order to discourage him and other employees from such support and engaging in such activities.

6. Respondent's unfair labor practices burden and affect commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I recommend to the Board that it order Respondent to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. In addition to posting notices which prohibit repetition of Respondent's unlawful conduct, I shall recommend that Respondent make its employee, John Cilento, whole for any loss of earnings and benefits he may have sustained by virtue of Respondent's unlawful discharge of June 9, 1993, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Union's petition in this matter was filed on April 12, 1993. All of the above unfair labor practices occurred thereafter and before the Board-conducted election of June 24, 1993. As the General Counsel observes (G.C. Br. 2), certain of the unfair labor practices found herein were not the subject of objections filed by the Union. These unfair labor practices include the findings that Supervisor Robert Vogel, on May 14, 1993, engaged in the unfair labor practice, inter alia, of promising employees improved benefits and soliciting employees to convince other skilled maintenance employees to vote against the Union, all in violation of Section 8(a)(1) of the Act. See paragraphs 6(a)(ii) and (b). In addition, pursuant to complaint paragraph 7(b)(i) General Counsel further

[14] I am at a loss to understand Respondent's extensive defense litigation surrounding Cilento's alleged failure to help employee McCann move a cabinet. To insist, as Vogel insisted (Tr. 775) that Cilento's misconduct in this June 2 episode was ''the final straw'' that led to the late May decision to discharge Cilento was baffling. As might be expected, Vogel was asked to, but could not, explain how Cilento's alleged misconduct of June 2 (Schibla's note of June 2, 1993; G.C. Exh. 9; Tr. 775) could be the ''final straw'' in Vogel's late May decision to discharge Cilento. Even Respondent's formal memorialization supporting the entire rationale of the discharge (G.C. Exh. 4) is dated June 1 before the McCann incident (June 2). At that late point in the hearing, a common case of pretextual discharge was lurching into opera buffa.

observes that Supervisor Giacobbe's telephone question to employee Maxson (what could be done to stop the Union) was not included as objectionable conduct by the Union. The balance of the established Section 8(a)(1) violations constituted objectionable conduct. I find, however, that all of the objectionable conduct and all of the findings of violation of Section 8(a)(1) of the Act (whether or not alleged as objectionable conduct) occurred between the filing of the petition (April 12, 1993) and the holding of the election (June 24, 1993). Findings of these disseminated violations of Section 8(a)(1) of the Act in this period, especially in this relatively small unit (44 employees) in a close election, mandate that the election be set aside, *Ideal Electric & Mnfg. Co.*, 134 NLRB 1275 (1961). This objectionable conduct undermined the laboratory conditions in which Board-conducted elections are held. Conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in elections *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). In view of the fact that this was a consolidated hearing, it is immaterial whether the misconduct alleged as unfair labor practices was raised by the Union in its objections. Thus, in a consolidated hearing, as here, findings of unfair labor practices in the *Ideal Electric* period not raised as objectionable conduct may form the basis of setting aside the election. *Monroe Tube Co.*, 220 NLRB 302, 305, (1975); *White Plains Lincoln-Mercury*, 288 NLRB 1133 (1988). I therefore recommend to the Board that the election of June 24, 1993, in Case 4–RC–18096 be set aside because of my findings of objectionable conduct occurring as largely parallel, disseminated unfair labor practices during the *Ideal Electric* period in violation of Section 8(a)(1) and (3) of the Act.

The Challenges

There is no dispute that there are three challenges to be resolved in this litigation. At the June 24, 1993 election, the NLRB agent conducting the hearing, inter alia, challenged the ballots of Albert Behring, John Cilento, and Norman Piercy because their names did not appear on the list of eligible voters. In addition, Respondent challenged the ballot of Albert Behring on the further ground that he was a *temporary employee*; and the ballot of John Cilento on the ground that he was ineligible to vote because he was not employed on the date of the election. By virtue of the Regional Director's supplemental decision on objections and challenged ballots, dated November 2, 1993, as thereafter modified by the Regional Director's January 28, 1994 order consolidating cases and scheduling consolidated hearing, a hearing on the challenges to the ballots of John Cilento, Norman Piercy, and Albert Behring was consolidated with the hearing on objections and unfair labor practices in the instant consolidated matter.

With regard to *John Cilento*, I have found that Respondent, in violation of Section 8(a)(3) and (1) of the Act, unlawfully discharged him on June 9, 1993. Under established Board doctrine, an unlawfully discharged employee remains an employee for purposes of voting in the election. I therefore *overrule* the challenge to John Cilento's vote and recommend to the Board that his vote be counted if, under my subsequent ruling, the counting of Cilento's vote is necessary.

With regard to *Albert Behring*, the uncontradicted evidence shows that Behring was hired in October 1992 on an indefinite basis to replace employee Richard Hourigan, a stationary engineer, a member of the bargaining unit. Hourigan, at the time of the hiring of Behring, and thereafter through the date of this hearing, remains on extended medical leave because of a neurological impairment. There was no showing at the hearing that Hourigan's neurological impairment, at any material time, subsequent to the hiring of Behring, entered into a state of remission or that there was a prognosis showing that remission was imminent or even in the picture. Respondent was unable to establish that Hourigan, who had been absent from work for many months, had not exhausted his sick leave accumulation or personal leave accumulation. The evidence establishes that Respondent did not know whether Hourigan would ever return to work in view of his disability. Behring was hired on a full-time interim basis and neither Respondent's records nor other evidence shows a terminal date for Behring's employment. Respondent's records further show that at the time of his hiring in October 1992, Behring said that he would ''be willing to go permanent if a permanent full-time position became open.'' (R. Exh. 23.)

The Board rule is that a ''temporary'' employee is eligible to vote unless there is a definite termination date established for his tenure. *U.S. Aluminum Corp.*, 305 NLRB 719 (1991). In the instant case, not only was Behring's tenure of employment not limited by a definite termination date, but there was, in addition, no manifested condition upon which his employment would terminate. In short, not only was there no termination date established but Respondent did not assert that even if Hourigan entered into a state of remission he would be rehired or that Behring would be terminated. I conclude, therefore, that the challenge to Behring's ballot based upon his being a ''temporary employee'' be *overruled* and that Behring's vote be counted if the Board finds that his ballot, like Cilento's, would be relevant under the circumstances hereinafter noted in my ruling on the challenge to Norman Piercy's ballot.

The Challenged Ballot of Norman Piercy

As noted in the Regional Director's decision and direction of election issued May 27, 1993, the Union and Respondent stipulated and agreed that a unit of skilled maintenance employees at Respondent's two hospital facilities was the appropriate unit. Accordingly, the Regional Director, with the consent of the parties, found that the following unit constituted a unit appropriate for the purpose of collective bargaining within them meaning of Section 9(b) of the Act:

> All full-time and regular part-time skilled maintenance employees including . . . maintenance helper-drivers . . . excluding all other employees.

Norman Piercy was initially employed as a security guard, had no maintenance experience, and commenced his employment as a driver effective July 1987. There are no maintenance skills listed on his application for the job and the only skill he listed was his possession of a driver's license and his ability to be punctual. His job has routinely consisted of the pickup and delivery of boxes of supplies, mail, paper, prescriptions, birth certificates, and X-rays. The Union failed to establish that Piercy, at any material time, performed any

skilled maintenance work or worked in conjunction with, or helped, any of the skilled maintenance employees perform their jobs. He was never assigned the performance of any maintenance work, skilled or otherwise, nor was he ever assigned to assist in the performance of such work, nor did he, in fact, ever assist or perform such work. Respondent observes that the driver classification, in contrast to the skilled maintenance classification, requires only a high school education and a valid New Jersey driver's license (R. Br. 53). Respondent's drivers are employed in several departments in Respondent's establishment: the X-ray department, the laboratory department, Eldermed, and the maintenance department.

Discussion and Conclusions

The Board's final rule in establishing bargaining units appropriate in the health care industry, reprinted in 284 NLRB 1528 (1987), establishes that one of eight appropriate units is: ''All skilled maintenance employees.'' *St. Margaret Memorial Hospital v. NLRB*, 991 F.2d 1146 (3d Cir. 1993). The validity of the Board's rule was upheld in *American Hospital Assn. v. NLRB*, 111 S.Ct. 1539 (1991).

As the Union acknowledges, where there are voting eligibility disputes in a stipulated unit, the Board's function is to ascertain the parties' intent with regard to the disputed employees (U. Br. 13). In the instant case, the parties stipulated the inclusion in the skilled maintenance unit not of ''drivers'' but only of ''maintenance helper-drivers.'' Whatever else Piercy was, he was not declared to be a maintenance help-driver. He was hired as a ''driver'' and performed work as a ''driver.'' He was never a maintenance helper nor did he in fact help skilled maintenance employees (or, on this record, any other employees) perform skilled maintenance or any other maintenance work. He was a driver.

The fact that he was employed in the maintenance department, was supervised by the supervisors of skilled maintenance employees, and worked closely with clerical employees in the maintenance department (similarly excluded from the skilled maintenance unit) is not determinative. The department in which an employer places an employee is not determinative of whether the employee nevertheless properly belongs in the skilled maintenance unit. *Rhode Island Hospital*, 313 NLRB 343 (1993). See *Toledo Hospital*, 312 NLRB 652 (1993). In *Rhode Island Hospital*, supra, the union would include in the skilled maintenance department certain classifications in the transport department including two motor vehicle operators. In that case, as in the instant case, the drivers were required to have completed a high school education and hold a valid chauffeur's license. One of the drivers was responsible for transporting confidential materials from the hospital to other hospitals and any other materials needed to be hand-delivered by a courier. The other driver was primarily responsible for delivering mail to the hospital's two off-campus sites. In that case, as in the instant case, the drivers used motor vehicles provided by the hospital, performed no maintenance work and assisted no employees who performed maintenance functions. The Board held, that these drivers performed no skilled maintenance work and that there was no basis for including them in the skilled maintenance unit. The fact that the drivers drove to all areas of the hospital and were not generally confined to a single building was as irrelevant to their placement as was the level of their salary and the ultimate supervision, common with skilled maintenance employees, under which they worked. In short, the Board excluded them from the skilled maintenance unit. *Rhode Island Hospital*, supra.

The fact that driver Lowe, another driver employed in the skilled maintenance department, voted in the June 24, 1993 election without challenge (G.C. Exh. 10) by any party makes his vote, his qualification, and his function irrelevant in the instant case. Had Lowe been *challenged*, the matter of his classification and function would have been presented for resolution. Where, as here, all parties permitted him to vote without challenge, they have effectively mooted his position as a means of comparison with that of Norman Piercy. The issue is whether Piercy should vote, not whether unchallenged Lowe, who may have been similarly situated, creates a precedent supporting Piercy's vote.

I therefore conclude that the unit and classifications stipulated by the parties, the classification and functions of Norman Piercy all demonstrate that it was the intent of the parties to exclude mere drivers from the skilled maintenance unit; that Piercy is not a maintenance helper-driver; that his functions do not remotely resemble that of a helper to any maintenance employee; and that he has no community of interest with the unit employees. I therefore recommend to the Board that Piercy is not eligible for inclusion in the unit and that the challenge to the ballot of Norman Piercy be *sustained*.

In view of my recommendation to the Board that the challenge to Norman Piercy's ballot be sustained, it follows that his vote may not be counted in the election. Assuming, therefore, that the challenged ballots of Cilento and Behring, supra, are to be opened and counted because their challenges have been *overruled* and assuming, further, that they voted in favor of the Union, the result of such voting would nevertheless show, in the light most favorable to the Union, a tie vote of 20 to 20. It is therefore my recommendation that, although I have overruled the challenges to both Cilento and Behring, if the Board accepts my further recommendation that the challenge to Piercy be sustained, it is then unnecessary to open or count the ballots of Cilento and Behring because the resulting tally of ballots would, in a light most favorable to the Union, show a tie vote of 20 to 20.

I therefore recommend to the Board that in view of my having sustained the objections to the June 24, 1993 election, that the election in Case 4–RC–18096 be set aside; that the case be severed and remanded to the Regional Director; and that a new election be held whenever the Regional Director, Region 4, finds that the circumstances for such new election in the appropriate unit be just and proper.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Medical Center of Ocean County, Brick and Point Pleasant, New Jersey, its officers, agents, successors, and assigns, shall

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Coercively interrogating employees with regard to their membership in, sympathy for, and activities on behalf of International Union of Operating Engineers, Local 68-A, AFL–CIO (the Union), or any other labor organization.

(b) Threatening employees with loss of benefits if the employees select the Union, or any other labor organization, as their collective-bargaining representative.

(c) Asking employees to give Respondent additional time to solve employee problems; promising employees to improve their benefits and terms and conditions of employment; and soliciting employees to convince other employees to cease their support of the Union all for the purpose of discouraging employees from selecting the Union as their collective-bargaining representative.

(d) Asking employees what could be done to stop the Union; soliciting employees to form an association of employees to deal with the Respondent rather than deal through the Union.

(e) Soliciting employees' complaints and grievances and promising them improved benefits in order to discourage them from selecting the Union as their collective-bargaining representative.

(f) Warning an employee to make amends to a supervisor because of the supervisor's belief that the employee is a union advocate, in order that the employee not be placed in an unfavorable category by the supervisor.

(g) Discharging or otherwise discriminating against any employee because of his membership in, sympathy for or activities on behalf of the Union thereby discouraging support for the Union or any other labor organization.

(h) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to John Cilento immediate and full reinstatement to his former job and position of employment, discharging, if necessary, any replacement, or if such job or position no longer exists, to substantially equivalent employment without prejudice to his seniority and other rights and privileges, and make him whole, with interest, as set forth in the remedy section of this decision above, for any loss of earnings and benefits he may have suffered as a result of Respondent's discrimination against him.

(b) Remove from Respondent's files any notes, memoranda, and records, for the period March 31 to June 9, 1993, or any other reference to or supporting Cilento's June 9, 1993 discharge, and notify him, in writing, that this has been done and that these materials will not be used against him hereafter in any personnel actions.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(d) Post at its facilities in Point Pleasant and Brick, New Jersey, and at its Eldermed facility, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Union's objections to the election herein be sustained, and that the election in Case 4–RC–18096 be set aside.

IT IS FURTHER ORDERED that Case 4–RC–18096 be severed and remanded to the Regional Director for Region 4, and that the Regional Director conduct a second election at such time and place as he deems circumstances afford a free choice of a bargaining representative in the appropriate unit.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, or otherwise discriminate against, any of our employees because of their membership in, sympathy for, or activities on behalf of International Union of Operating Engineers, Local 68-A, AFL–CIO (the Union).

WE WILL NOT coercively interrogate our employees with regard to their membership in, activities on behalf of, or sympathies for the Union or any other labor organization, or threaten them with loss of benefits if they support the Union.

WE WILL NOT promise any employee benefits or changes in their terms or conditions of employment if they forego their support for the Union.

WE WILL NOT inquire of any employee how to stop union activity among our employees, suggest that they form an association of employees rather than bargain through the Union, solicit employees' complaints and grievances, promising them improved benefits in terms and conditions in order to discourage them from selecting the Union as their collective-bargaining representative.

WE WILL NOT warn employees to apologize to or make amends to a supervisor because the supervisor believes that the employee is a union advocate, all in an effort to discourage employees' support for the Union.

WE WILL NOT request employees to give us time to solve their problems in order that they cease their support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer to John Cilento, unlawfully discharged on June 9, 1993, immediate and full reinstatement to his former position of employmentat our Point Pleasant facility, discharging, if necessary, any replacement or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights he previously enjoyed, and WE WILL make him whole with interest, for any loss of earnings or benefits he may have suffered by reason of his being unlawfully discharged.

WE WILL remove from our files any notes, memoranda, records, for the period March 31 to June 9, 1993, or any other reference to or supporting Cilento's June 9, 1993 discharge, and notify him, in writing that this has been done and that these materials will not be used against him hereafter in any personnel actions.

MEDICAL CENTER OF OCEAN COUNTY